

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

COURT
TEXAS

AUG 14 2000

DAVID J. MALAND, CLERK

BY
DEPUTY

V.

C.A. NO. 6:00-CV442 WMS

V.

(Steger, J.)

Third-Party Defendants.

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2. Responding to the allegations in paragraph II of the Third-Party Petition, entitled "Plaintiff's Allegations," Prudential Insurance is not required to admit or deny the matters set forth therein, because they do not constitute claims or averments relied upon by Third-Party Plaintiffs as provided in Rule 8 of the Federal Rules of Civil Procedure. Alternatively, Prudential Insurance is without knowledge or information sufficient to form a belief as to "Plaintiff's Allegations," and denies same. Prudential Insurance generally denies the remaining averments in Paragraph II of the Third-Party Petition.

3. Responding to the allegations in paragraph III of the Third-Party Petition, entitled, "Role of 'Health Carriers'," Prudential Insurance admits, based upon information and belief, that the health insurance plans at issue here are governed by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). Prudential Insurance generally denies the remaining averments in Paragraph III of the Third-Party Petition.

4. Responding to the allegations in paragraph IV of the Third-Party Petition, entitled, "Contribution/Indemnity Claim," Prudential Insurance admits that the Third-Party Plaintiffs seek the relief requested in this paragraph, but denies that they are entitled to any such relief. Prudential Insurance generally denies the remaining averments in Paragraph IV of the Third-Party Petition.

5. Responding to the allegations in the paragraph beginning with the word "WHEREFORE," Prudential Insurance admits that the Third-Party Plaintiffs seek the relief requested in this paragraph, but denies that they are entitled to any such relief.

Prudential Insurance generally denies the remaining averments in the paragraph beginning with the word “WHEREFORE” in the Third-Party Petition.

6. Prudential Insurance generally denies all averments contained in the Third-Party Petition, except such designated averments that are either expressly admitted or otherwise qualified hereinabove.

AFFIRMATIVE DEFENSES

Prudential Insurance, pursuant to Fed. R. Civ. P. 8(c), would show the following:

7. The Third-Party Plaintiffs fail to state a claim for which relief can be granted.

8. In connection with the Third-Party Plaintiffs’ claim for Declaratory Judgment under Chapter 37 of the Texas Civil Practice and Remedies Code, Prudential Insurance affirmatively asserts that it has retained the firm of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP to represent it in this action and has agreed to pay the firm reasonable and necessary attorney’s fees. Prudential Insurance asserts that an award of reasonable and necessary attorney’s fees to it as a prevailing party would be equitable and just, and is therefore permissible. Prudential Insurance affirmatively asserts its right to such fees as a prevailing party.

9. Third-Party Plaintiffs’ claims are barred to the extent that they did not timely comply with or fulfill applicable administrative procedures and remedies and did not satisfy all conditions precedent.

10. Third-Party Plaintiffs’ claims for relief are barred to the extent the relief sought exceeds that available under the legal theory alleged.

11. Third-Party Plaintiffs' claims for relief are barred to the extent the relief requested exceeds that available under Prudential Insurance's economic circumstances and status of operation.

12. Third-Party Plaintiffs' claims are subject to setoff, offset and/or recoupment.

13. Third-Party Plaintiffs have not properly mitigated its damages, if any.

14. Prudential Insurance's actions, if any, were based on reasonable factors other than the alleged wrongful conduct.

15. Third-Party Plaintiffs' claims are barred because Prudential Insurance actions, if any, were done reasonably and in good faith.

16. Any damage suffered by Third-Party Plaintiffs is the result of their own action or inaction.

17. An award of punitive damages in this case would violate Prudential Insurance's due process rights under the Fourteenth Amendment of the United States Constitution, its right to be free from excessive fines under the United States Constitution, and its right to equal protection under the United States Constitution.

18. Prudential Insurance requests that Third-Party Plaintiffs specifically plead the amount of damages which they are seeking.

19. Third-Party Plaintiffs' claims may be barred, in whole or in part, by the applicable statute of limitations.

20. Third-Party Plaintiffs' claims, including all relief thereunder, are completely preempted by ERISA.

21. Prudential Insurance requests its attorneys' fees and costs to the fullest extent that it may be entitled to under ERISA 502(j)(1).

22. Third-Party Plaintiffs' claims are barred by laches, estoppel (including judicial estoppel), and waiver.

23. Prudential Insurance reserve the right to amend its Answer; to add additional or other affirmative defenses; to delete or withdraw affirmative defenses; and to add such counterclaims as may become necessary after reasonable opportunity for discovery.

WHEREFORE, PREMISES CONSIDERED, Prudential Life Insurance Company of America prays that this Court render judgment for it , that Third-Party Plaintiffs take nothing by their claims, that Prudential Insurance recover its reasonable attorney's fees and all costs of court incurred herein and that Prudential Insurance have such other and further relief, whether at law or in equity, to which they may be justly entitled.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ
EDELMAN & DICKER LLP



E. Stratton Horres, Jr.
State Bar No. 10011800

Attorney-in-Charge for Third-Party
Defendant Prudential Insurance
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ATTORNEYS FOR THIRD-
PARTY DEFENDANTS,
PRUDENTIAL HEALTHCARE
AND LIFE INSURANCE
COMPANY OF AMERICA AND
PRUDENTIAL INSURANCE
COMPAMNY OF AMERICA.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been forwarded pursuant to the Federal Rules of Civil Procedure to all known counsel of record on this the 9th day of August, 2000.



Wade A. Forsman